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11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE WESTERN DISTRICT OF WASHINGTON**

12 WASHINGTON TOXICS COALITION, )  
13 NORTHWEST COALITION FOR )  
14 ALTERNATIVES TO PESTICIDES, )  
15 PACIFIC COAST FEDERATION OF )  
16 FISHERMEN'S ASSOCIATIONS, and )  
17 INSTITUTE FOR FISHERIES RESOURCES, )

Case No. C01-0132

**FEDERAL DEFENDANTS'**  
**NOTICE OF FILING FORM OF**  
**INJUNCTIVE ORDER**

17 Plaintiffs,

18 vs.

19 ENVIRONMENTAL PROTECTION AGENCY, )  
20 and MARIANNE LAMONT HORINKO )

21 Defendants.

22 vs.

23 AMERICAN CROP PROTECTION ASSOC. et al )

24 Intervenor-Defendants )  
25

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27  
28 FEDERAL DEFENDANTS' NOTICE OF FILING FORM OF  
INJUNCTIVE ORDER

Case No. C01-0132

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On August 14, 2003, and by minute order, the Court directed the parties to confer, and for the parties to submit a proposed form of an injunctive order addressing the Court's orders and taking into account the Court's direction from the bench on that date. The parties sought leave to extend the September 23, 2003 deadline for that effort one week, until September 30, 2003.

During this time, the parties have conferred and reached agreement on the form of some of the provisions that the Court has indicated it would include in such an order. The parties have not agreed on the form of all provisions for the injunction. Specifically, the intervenor defendants have agreed with the defendants on all the provisions and wording of the order submitted with this notice.<sup>1/</sup> The plaintiffs do not agree, and are filing their own, separate, order. This notice will highlight for the Court the areas of agreement and disagreement between the defendants' joint order and the plaintiffs separate order.

#### **I. Significant General Differences**

There are three significant general differences between the orders. First, in the enjoining language suggested by the plaintiffs, they make no attempt to address the Court's willingness to treat different decisions by EPA differently, and to craft an order that recognizes the difference in determinations for the same pesticide based upon a Salmon ESU. As the Court has recognized, the 54 active ingredients can fall into one of four different decisional categories<sup>2/</sup>, and then be further broken down by ESU. The defendants' order recognizes the current state of the determinations by EPA and enters an injunction specific to the determination made by EPA with respect to the ESU

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<sup>1/</sup> As an initial matter, the defendants must state, to preserve their appeal record, that by tendering this proposed order, the defendants in no way consent to any injunctive relief ordered by this Court, and do not agree that any of the injunctive relief set forth in this proposed order is supported by law or the factual record in this matter. The defendant tender this proposed order because they have been directed to do so by the Court, and not because they agree with, support or believe that any of the relief contained in this order is appropriate.

<sup>2/</sup> Those four categories are: 1) pesticides for which effects determinations are pending; 2) pesticides that need formal consultation/are likely to adversely effect ("LAA") ; 3) pesticides that are not likely to adversely effect ("NLAA"); and 4) pesticides that have no effect.

for which it was made; the plaintiffs' order does not.<sup>3/</sup> The defendants' order imposes the buffer size advocated by plaintiffs (20 yard ground and 100 yard aerial) for all pesticide/ESU combinations that are either pending or that are determined to need formal consultation/LAA.

The second significant general difference is that the plaintiffs ignore the Court's statements and direction at the August 14, 2003 oral argument that the Court is going to exclude from its injunction those pesticide/ESU decisions for which EPA has made a NLAA determination. August 24, 2003 Transcript at 53-4. Contrary to the Court's direction, the plaintiffs have tendered an order that applies their preferred buffer zones to NLAA determinations by EPA. The defendants' order reflects the Court's direction on this issue during oral argument and excludes these pesticide/ESU combinations from its order.

The third significant general difference is that the plaintiffs' order fails to follow the standard format of a properly styled judicial order in that it does not articulate clearly when the Court is granting relief, denying relief, or substituting some other form of relief. The defendants order makes clear the Court is granting in part and denying in part the specific relief requested, and identifies where it is crafting different relief.

## **II. Specific Differences Between the Two Tendered Orders**

In section "II. Salmon Supporting Waters" the plaintiffs introduce a definition never offered in their pleadings or at the August 14 hearing. They now seek to have the injunction apply to all "accessible" waters within designated critical habitat for the ESUs. However, this definition suffers from the same infirmity as the one plaintiffs originally advanced: it seeks to apply the injunction to all "accessible" waters in a geographic area that includes many non-salmon bearing streams. As defendants have argued, the order should extend to salmon occupied streams rather than any stream that might be "accessible." It is important to note that "critical habitat" designations cover geographic regions that include both salmon-bearing and non-salmon-bearing streams. While many

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<sup>3/</sup> The plaintiffs do later indicate in the terminating events section that "no effect" determinations will terminate the order. However, this leads to a confusion because the Court would be entering an order seeming to enjoin an activity but at the same time "terminating" the injunction.

of the streams in critical habitat may be accessible to salmon, salmon are in fact only found in a subset of such streams. The defendants' use of the StreamNet Database with an overlay of the critical habitat area for Washington and Oregon applies the injunction to those waters that actually support salmon, not to all waters that are accessible. We note also that plaintiffs have included estuaries -- which are large water bodies subject to tidal action (e.g., bays) and therefore substantial dilution -- rather than streams or rivers where the dilution of pollutants is more limited.

In section "II. B. Buffer Variation" the plaintiffs identify certain pesticides and specific buffers. This issue is addressed in defendants' order at section "III. Pesticide Specific Injunctive Relief." All pesticide specific injunctive relief is contained in a Table prepared by intervenors, since this is the only part of the order not advanced by EPA. While the intervenors and registrants may be in a position to provide analysis to the Court, consistent with its position at oral argument, the EPA can not advance pesticide specific buffers until it has done such an analysis itself. The order is drafted such that the Court could either adopt or make whatever edits its desires to the intervenors submission without needing to modify the language used in the order itself.

Plaintiffs' section "II. C. Specific Pesticide Produce or Use Exclusions" and section "II. D. Particular Pesticide Programs Excluded" are addresses in defendants' single section "IV. Pesticide Uses Excluded from this Order." There is no basis to refer to the exclusions in plaintiffs section II.D as "programs," and use of this term may create confusion both in the EPA and in a user community attempting to understand this order. The defendants' order is structured so that pesticide specific difference are addressed in one section (section III), and categorical use exclusions, i.e. uses of pesticides that are excluded in their entirety from the order without regard to the particular pesticide, are in another (section IV). The defendants believe this is a better and more logical grouping than that presented in plaintiffs' order. The categorical use exceptions to which defendants believe plaintiffs agreed are included in the body of defendants order, and the others are presented in the Table supplied by intervenors. To the extent there is agreement between intervenor defendants and plaintiffs on a catagorical use extension, that could have been included, in the order body had defendants been aware. In any event, the court may either adopt the Table of catagorical use

1 exceptions presented by the intervenor defendants, or, may edit that table without needing to change  
2 the body of the defendants' draft order.

3 The defendants' section IV categorical use exceptions differ in substance from plaintiffs  
4 section III. D. particular pesticide program exclusions. The public health language used by plaintiffs  
5 is more narrow than that used in defendants' order, and seemingly would require a public entity to  
6 do the application itself through its own employees, rather than allowing application by others under  
7 the orders and at the direction of the entity. Public entities charged with vector control, often use  
8 contractors, working under the public entities' direction, to control vectors. Plaintiffs' language  
9 would significantly limit the ability of public entities to carry out these important public health  
10 functions.

11 The noxious weed language used by the defendants tracks that used for public health vector  
12 control. The control of noxious weeds is an important issue in preserving the environment, and the  
13 plaintiffs have not presented any evidence or demonstrated why the protection of the environment  
14 should be compromised by this Court imposing all sorts of restrictions and conditions on this  
15 application, without really knowing what the effect will be on public health or the environment.

16 The language used by the parties to create the exception for applications that have been  
17 addressed by NMFS is also very different. First, the plaintiffs would exclude uses "authorized by"  
18 a NMFS biological opinion with a incidental take statement. As a legal matter, the plaintiffs  
19 formulation is error: biological opinions do not "authorize" the action upon which an agency has  
20 consulted, as the consultation regulations and applicable case law demonstrate. Second, the  
21 plaintiffs language limits NMFS treatment to "non-jeopardy" opinions, but such opinions may  
22 contain reasonable and prudent alternatives ("RPAs"), which if utilized would not result in jeopardy.  
23 The plaintiffs formulation forecloses applications consistent with NMFS RPAs or other non-  
24 jeopardizing agency action. Also, plaintiffs formulation requires an incidental take statement  
25 ("ITS"), but NMFS may issue a biological opinion that does not find take at all, and in such an  
26 instance could not, as a matter of current law, issue an ITS. The defendant exclude all permits under  
27 ESA section 10, while plaintiffs limit it. There is no basis for such a limitation: if NMFS has

addressed the issue, they have addressed the issue. Finally, the plaintiffs' limit the ESA section 4(d) exception to a currently codified 4(d) rule, but such a formulation forecloses future additional NMFS 4(d) rules. There is no reason for this limitation.

The urban pesticides relief is radically different between the two orders. The defendants' urban use injunction puts into place point of sale distribution of educational information in the immediate future. It also provides for non-point-of-sale distribution of educational information, and, will spread this information not only to homeowners, but also to certified applicators. It will address the concern raised by plaintiffs, i.e. educating the public and users that the urban environment is different, and therefore what is placed on the ground may get into salmon bearing waters. The plaintiffs' proposal enjoins the sale in urban areas unless "EPA ensures that all purchasers and users receive" certain specific language. The plaintiffs order does not say how EPA is supposed to "ensure" receipt of information by the general public, and sets up a standard impossible for EPA to meet. Even a change to the label could ensure receipt by users. In any event, EPA can not change a pesticide label without following the requirements and procedures for label changes under FIFRA, meaning that EPA may have to bring cancellation or suspension actions to compel action under FIFRA – the very relief the court made clear it would not impose See Aug. 8 2003 Order.

The plaintiffs' terminating events differ from defendants because, as discussed above, the plaintiffs have ignored the Court's direction that the injunction would not extend to the EPA's NLAA determination. The defendants' order terminates the injunction upon such a finding by EPA, the plaintiffs terminate the injunction only when consultation is completed or EPA makes a no effect finding.

Finally, the plaintiffs seek to have the Court affirmatively compel EPA to fulfill notification requirements, and to compel EPA to compel states and other actors take certain notification actions.

Compelling EPA to take such affirmative steps is not appropriate in a court issued injunction, and indeed the Court seemingly acknowledged this principle in its order when it stated it was not ordering EPA to take any action, but was merely setting aside a class of agency actions. August 8, 2003 Order at 21.

Respectfully submitted,

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Date 10/2/03

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